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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9
10 DONNA K. BUCKALEW,
11 BRIAN D. PURKHISER,
12 On behalf of themselves
13 and all others similarly situated

14 *Plaintiffs,*

15
16 *v.*

17
18 SUTTELL & HAMMER,
19 P.S.

20 *Defendant.*

Case No. CV-10-3002-LRS
Complaint for FDCPA Violations
Class Action
Demand for Jury Trial

21
22 SECOND AMENDED CLASS-ACTION COMPLAINT

1 Introduction 3

2 Parties 5

3 Jurisdiction and venue 7

4 Violation of the FDCPA 9

4.1 Single Claim Limited to Plaintiff Donna
K. Buckalew Individually 13

5 Cause of action 16

6 Class allegations 17

6.1	Class definition	17
6.2	Rule 23(a) prerequisites	18
6.3	Rule 23(b)(3)	21

7 Prayer for relief 23

1 Introduction

1. This is a case under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 *et seq.* The FDCPA provides: “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. §1692e. The FDCPA defines a variety of specific acts that constitute “false, deceptive, or misleading” debt-collection practices or that otherwise violate the FDCPA.

2. Whether a letter or other communication constitutes an unfair debt-collection practice is judged from the perspective of the “least sophisticated consumer.” *See Swanson v. South Oregon Credit Services, Inc.*, 869 F.2d 1222, 1225–26 (9th Cir. 1988). “The basic purpose of the least-sophisticated-consumer standard is

1 to ensure that the FDCPA protects all consumers, the
2 gullible as well as the shrewd.” *Clomon v. Jackson*, 988
3 F.2d 1314, 1318 (2d Cir. 1993).

4 **3.** The FDCPA provides for statutory damages
5 of up to \$1,000 per plaintiff. *See* 15 U.S.C. §1692k(a)(2)(A).
6 The FDCPA also specifically provides for class actions
7 against debt collectors. “[I]n the case of a class action,
8 (i) such amount for each named plaintiff as could be re-
9 covered under subparagraph (A), and (ii) such amount as
10 the court may allow for all other class members, without
11 regard to a minimum individual recovery, not to exceed
12 the lesser of \$500,000 or 1 per centum of the net worth
13 of the debt collector.” 15 U.S.C. §1692k(a)(2)(B). In a
14 class action, therefore, the statutory damages provided
15 by the FDCPA are up to \$1,000 for each named plaintiff

1 plus a further amount up to the lesser of \$500,000 or 1%
2 of the defendant debt collector's net worth for the class
3 members other than the named plaintiff.

4 **4.** The FDCPA also permits recovery of "the
5 costs of the action, together with a reasonable attorney's
6 fee as determined by the court." 15 U.S.C. §1692k(a)(3).

7 **2 Parties**

8 **5.** Plaintiff Donna Buckalew resides and is domi-
9 ciled in White Salmon, Washington.

10 **6.** Plaintiff Brian Purkhiser resides and is domi-
11 ciled in Edmonds, Washington.

12 **7.** Plaintiffs may be served through their attor-
13 neys, Weisberg & Meyers, LLC.

14 **8.** Plaintiffs are consumers as *consumer* is de-

1 fined in the FDCPA because they are natural persons who
2 are alleged by Defendant to be obligated to pay debts.
3 *See* 15 U.S.C. §1692a(3).

4 **9.** Defendant Suttell & Hammer P.S., is a com-
5 pany engaged in the business of attempting to collect
6 debts by mail and telephone. Defendant's principal place
7 of business is in Bellevue, Washington. Defendant may be
8 served through its registered agent, Walter J. Yund Jr.,
9 701 Fifth Avenue, Suite 550, Seattle, Washington 98104.

10 **10.** Defendant is a debt collector as *debt collector*
11 is defined in the FDCPA. This is because Defendant uses
12 the mails, the telephone system, and other instrumental-
13 ities of interstate commerce in a business, the principal
14 purpose of which is to collect debt owed to third par-
15 ties. *See* 15 U.S.C. §1692a(6). In this case, Defendant

1 alleged that the debts Defendant sought to collect were
2 owed to Capital One Bank (USA), N.A. The debts that
3 Defendant sought to collect are debts as *debt* the term
4 debt defined in the FDCPA because they were credit-card
5 debts incurred for the personal use of the plaintiffs. *See*
6 15 U.S.C. §1692a(5).

7 **3 Jurisdiction and venue**

8 **11.** This Court has subject-matter jurisdiction un-
9 der 28 U.S.C. §1331 (federal question) and 15 U.S.C.
10 §1692k(d) (“An action to enforce any liability created
11 by this subchapter may be brought in any appropriate
12 United States district court without regard to the amount
13 in controversy”).

14 **12.** This Court has personal jurisdiction over De-

1 fendant because Defendant's principal place of business
2 is located in this state; Defendant undertakes continuous
3 and systematic business activities in the form of its debt-
4 collection business within this state; and the specific acts
5 that give rise to this complaint, namely, the sending and
6 receipt of Exhibits 1 and 2 took place in this state.

7 **13.** Venue is appropriate in this district under 28
8 U.S.C. §1391(b) because this is the judicial district in
9 which the plaintiffs reside and received the objectionable
10 letters, and hence is a judicial district in which a sub-
11 stantial part of the events giving rise to this action took
12 place.

1 **4 Violation of the FDCPA**

2 **14.** Exhibit 1 is a debt-collection letter with at-
3 tached affidavit sent by Defendant to plaintiff Donna K.
4 Buckalew and dated October 27, 2009.

5 **15.** The attached affidavit bears a court caption:
6 Capital One Bank (USA), N.A., Plaintiff, v. Donna K.
7 Buckalew, Defendant. *See* Ex. 1 at 2.

8 **16.** The affidavit refers to Capital One as ‘Plain-
9 tiff’ and Buckalew as ‘Defendant’ not only in its caption,
10 but throughout its text.

11 **17.** Exhibit 2 is a debt-collection letter with at-
12 tached affidavit sent by Defendant to plaintiff Brian D.
13 Purkhiser and dated June 14, 2010.

14 **18.** The attached affidavit bears a court caption:
15 Capital One Bank (USA), N.A., Plaintiff, v. Brian D.

1 Purkhiser, Defendant. *See* Ex. 2 at 2.

2 **19.** The affidavit refers to Capital One as ‘Plain-
3 tiff’ and Pukhiser as ‘Defendant’ not only in its caption,
4 but throughout its text.

5 **20.** The affidavits are materially and substantively
6 identical and refer to a variety of legal concepts expressed
7 in legalese:

- 8 ● the affidavits refer to “business books and records”
9 kept in “the course of regularly conducted business
10 activity” and contains other language intended to
11 prove up the business-records exception to the hearsay
12 rule, Ex. 1 at 2; Ex. 2 at 2.
- 13 ● the affidavits refer to the amount of the debt as the
14 “just and true sum” of the debt, Ex. 1 at 2; Ex. 2 at
15 2.
- 16 ● the affidavits describe Buckalew’s and Purkhiser’s
17 conduct as a ‘breach[] [of] the Agreement,” Ex. 1
18 at 2; Ex. 2 at 2.
- 19 ● the affidavits claim that Capital One is entitled “to

1 recover from Defendant(s) reasonable attorneys' fees
 2 and costs to the extent permitted by law," Ex. 1 at
 3 3; Ex. 2 at 3.

- 4 ● the affidavits state that the they are made "under
 5 penalty of perjury" and the affiants aver that "if
 6 called as a witness [they] would competently testify,
 7 under oath, thereto," Ex. 1 at 3; Ex. 2 at 3.
- 8 ● the affidavits are notarized and appear over a no-
 9 tary's seal, Ex. 1 at 3; Ex. 2 at 3.

10 **21.** The affidavits violate 15 U.S.C. §1692e(9).
 11 Section 1692e(9) provides that it is a "false, deceptive,
 12 or misleading" debt-collection practice to "use or dis-
 13 tribut[e] any written communication which simulates or is
 14 falsely represented to be a document authorized, issued,
 15 or approved by any court, official, or agency of the United
 16 States or any State, or which creates a false impression
 17 as to its source, authorization, or approval."

18 **22.** The characteristics of the affidavits described

1 in this subsection — their uniform use of legalese, their
2 uniform official appearance, their uniform reference to the
3 parties as ‘plaintiff’ and ‘defendant,’ and their court-like
4 caption — when judged under the least-sophisticated-
5 consumer standard render the substantively identical affi-
6 davits written communications that simulate a document
7 authorized, issued, or approved by a court or state official.
8 The least sophisticated consumer might well believe that
9 the affidavits are official court documents, which they
10 are not. For these reasons, sending each affidavit was,
11 without limitation, a violation of §1692e, §1692e(10), and
12 §1692e(9).

13 **23.** The affidavits are also misleading in that, be-
14 cause they appear to come from an ongoing court case,
15 they contradict the cover letters, which state that “[a]t

4.1 *Single Claim Limited to Plaintiff Donna K. Buckalew Individually*

1 this time suit has not been initiated.” In addition to vi-
 2 olating §1692e, §1692e(10), and §1692e(9), this violates
 3 15 U.S.C. §1692e(2)(A), which prohibits false representa-
 4 tions about the “legal status of any debt.” *See Johnson*
 5 *v. Eaton*, 873 F. Supp. 1019, 1026 (M.D. La. 1995).

6 **4.1 Single Claim Limited to Plaintiff Donna K. Buckalew**
 7 **Individually**

8 **24.** Defendant’s conduct with respect to Donna
 9 K. Buckalew individually, constitutes a violation of sec-
 10 tion 1692e(5). Defendant, via its October 27, 2009, cor-
 11 respondence and attached affidavit [Exhibit 1] threatened
 12 Plaintiff with legal action where such action was neither
 13 likely nor imminent. Indeed, Defendant did not serve
 14 Plaintiff with legal process until July 7, 2010. Contrary
 15 to Defendant’s representation of imminent legal action,

4.1 Single Claim Limited to Plaintiff Donna K. Buckalew Individually

1 Defendant's action as threatened was not imminent.

2 **25.** A defendant violates section 1692(e)(5) where
 3 it asserts that "it could take an action that it had no
 4 intention of taking and has never or very rarely taken
 5 before." *Brown v. Card Service Center*, 464 F. 3d 450
 6 (3rd Cir. 2006) (emphasis in original). Where the clear
 7 import of a communication can be taken as a whole to
 8 mean that "that some type of legal action has already
 9 been or is about to be initiated and can be averted from
 10 running its course only by payment," and where the refer-
 11 enced action is not taken, or cannot be taken, a violation
 12 of section 1692(e)(5) is established. *See Pipiles v. Credit*
 13 *Bureau of Lockport, Inc.* 886 F. 2d 22 (2d Cir. 1989)
 14 (emphasis in original); *see also Baker v. G.C. Services*
 15 *Corp.*, 677 F. 2d 775 (9th Cir. 1982) (upholding the dis-

4.1 *Single Claim Limited to Plaintiff Donna K. Buckalew Individually*

1 trict court’s finding that the defendant violated section
 2 1692(e)(5) where the subject communication “create(d)
 3 the impression that legal action by defendant is a real
 4 possibility . . . (and) a consumer could legitimately be-
 5 lieve that ‘further collection procedures’ meant court ac-
 6 tion when defendant had no intention of pursuing such a
 7 course of action.”).

8 **26.** Plaintiff could not have known of Defendant’s
 9 lack of intent to take action as threatened until such ac-
 10 tion was not taken within a reasonable time following De-
 11 fendant’s threat. Until the successive parade of horrors,
 12 suggested by Defendant as a natural and then-impending
 13 consequence, failed to transpire as so unequivocally sug-
 14 gested, Plaintiff could not have known of her appropriate
 15 cause of action.

1 **27.** Plaintiff's cause of action for violation of sec-
2 tion 1692e(5), on behalf of herself only, will affect nei-
3 ther Plaintiffs' allegations asserted on behalf of all those
4 similarly situated, nor Defendant's pending motion for
5 summary judgment as to asserted violations of sections
6 1692e(10) and 1692e(9).

7 **5 Cause of action**

8 **28.** Plaintiffs' sole cause of action is for viola-
9 tion of the above-cited provisions of the FDCPA. *See*
10 15 U.S.C. §1692k ("civil liability"). The facts alleged in
11 this complaint satisfy the elements of a cause of action
12 under this section.

1 **6 Class allegations**

2 **6.1 Class definition**

3 **29.** Plaintiffs seek to prosecute this case as a class
4 action on behalf of a class defined as follows:

5 All natural persons with addresses located in
6 the Ninth Circuit who, within one year before
7 the date of this complaint, received an affidavit
8 from Defendant in connection with an attempt
9 to collect a debt, where the debt was incurred
10 for personal, family, or household reasons and
11 the Defendant was collecting the debt on behalf
12 of a third party, and where the affidavit con-
13 tains statements or formatting including appear-
14 ing under a court caption, referring to the credi-
15 tor as ‘plaintiff’ and the recipient as ‘defendant,’
16 using legalese and referring to legal terms, and
17 appearing over the official seal of a notary that
18 suggest that the affidavit is an official court doc-
19 ument or that a legal proceeding is underway
20 when that is false.

6.2 *Rule 23(a) prerequisites*1 **6.2 Rule 23(a) prerequisites**

2 **30. Numerosity.** This is a letter case. All
 3 debtors or alleged debtors who received letters like Ex-
 4 hibits 1 and 2 have exactly the same claim as the named
 5 plaintiffs. Because Defendant is in the business of col-
 6 lecting debt and these letters appear to be form letters,
 7 the group of recipients of letters like Exhibits 1 and 2 is
 8 sufficiently numerous that it would be more efficient to
 9 address the claims of that group through a class action
 10 than through a multiplicity of individual actions.

11 **31. Common questions of fact and law.**

12 The questions of fact and law are entirely common. The
 13 only question of fact is whether the debtors or alleged
 14 debtors received letters like Exhibits 1 and 2 and whether
 15 the Defendant sent those letters. This question of fact can

6.2 Rule 23(a) prerequisites

1 be proved up by class members submitting the letters
 2 they received when they file their claims. The questions
 3 of law are whether the statements in Exhibits 1 and 2
 4 violate the FDCPA as alleged in this complaint. That is,
 5 the only questions of law are exactly the same for others
 6 who received letters like Exhibits 1 and 2 as they are for
 7 the named plaintiffs. Whether a debt collector's letter
 8 violates the FDCPA is a legal question to be resolved
 9 by the court. *See Terran v. Kaplan*, 109 F.3d 1428,
 10 1432 (9th Cir. 1997). "In the 9th Circuit, the court—and
 11 not the jury—determines whether a particular collection
 12 letter violates the FDCPA." *Anderson v. Credit Col-*
 13 *lection Services, Inc.*, 322 F.Supp. 2d 1094, 1096 (S.D.
 14 Cal. 2004) (*citing Swanson v. Southern Oregon Credit*
 15 *Services, Inc.*, 869 F.2d 1222, 1225-26 (9th Cir. 1988))

6.2 Rule 23(a) prerequisites

1 and *Terran v. Kaplan*, 109 F.3d 1428.

2 **32. Typicality.** The named plaintiffs are en-
 3 tirely typical of the class. Each received the materially
 4 identical letters in Exhibits 1 and 2. Because the only
 5 issue is whether the statements in those letters violate
 6 the FDCPA, the plaintiffs are typical of the class in the
 7 only relevant respect: each received the allegedly unlaw-
 8 ful letters.

9 **33. Adequacy of representation.** The named
 10 plaintiffs are adequate class representatives. They have
 11 chosen to vigorously pursue their claims. And they have
 12 engaged qualified class counsel specializing in consumer
 13 law that has prosecuted literally thousands of FDCPA
 14 cases around the country, and counsel specializing in com-
 15 plex commercial litigation that regularly handles sophis-

6.3 Rule 23(b)(3)

1 ticated, bet-the-company commercial cases around the
 2 country. Counsel have experience prosecuting and de-
 3 fending federal class actions.

4 **6.3 Rule 23(b)(3)**

5 **34.** This class should be certified under Rule 23(b)(3).

6 **35.** The common questions of law and fact pre-
 7 dominate in this case because the only questions are com-
 8 mon: whether letters like Exhibits 1 and 2 were sent
 9 and received and whether the statements in those letters
 10 identified in this complaint violate the provisions of the
 11 FDCPA identified in this complaint. There are no other
 12 questions of law or fact. Thus, the common questions
 13 predominate.

14 **36.** The class members have no substantial inter-
 15 est in controlling the prosecution of this case individually.

6.3 Rule 23(b)(3)

1 The questions are entirely common and the legal strategy
2 with respect to those questions is clear. The principal ar-
3 guments have already been spelled out in this complaint.
4 They are straightforward. And, in a class action, the
5 plaintiffs will have the services of counsel familiar with
6 complex litigation who would not have adequate incen-
7 tive to handle these cases on an individual basis.

8 **37.** There does not appear to be substantial pre-
9 existing litigation about these issues.

10 **38.** There is no reason why concentrating litiga-
11 tion in this forum would be undesirable. This forum is
12 convenient for Defendant, which has its principal office in
13 Bellevue, Washington, and which does substantial busi-
14 ness in this district, including attempting to collect the
15 debt that is the subject of the named plaintiffs' claims.

1 **39.** No special difficulties are posed in managing
 2 this class action. The law involved is entirely federal,
 3 so there are no choice-of-law issues to concern the court.
 4 And, because the claims are based entirely on documen-
 5 tary evidence — letters like Exhibits 1 and 2 — the evi-
 6 dence in the class action will be no more difficult to handle
 7 than it would be in individual cases.

8 **7 Prayer for relief**

9 **40.** Plaintiffs demand trial by jury on all issues.

10 **41.** Plaintiffs pray for relief as follows:

- 11 • class certification as described in §6;
- 12 • appointment of the named plaintiffs' counsel as lead
- 13 class counsel;
- 14 • statutory damages, costs, and attorneys' fees as pro-
- 15 vided for in 15 U.S.C. §1692k;
- 16 • pre- and post-judgment interest; and

- 1 • all other relief to which they are entitled in equity or
2 at law.

DATED: September 16, 2010.

Respectfully submitted,

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with:

United States District Court CM/ECF system.

Notification sent electronically via the Courts ECF system on this 16th day of September, 2010 to:

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